

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 13 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ARMANDO AVILA-RIVERA,

Defendant - Appellant.

No. 05-50218

D.C. No. CR-04-01965-WQH

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted April 5, 2006
Pasadena, California

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

On April 23, 2004, a Border Patrol Agent detained Jose Avila-Rivera approximately a mile north of the United States/Mexico border. Department of Homeland Security records indicate that Avila-Rivera had previously been deported to Mexico on January 9, 2004, through El Paso, Texas. On July 22, 2004,

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

a federal grand jury in the Southern District of California indicted Avila-Rivera on charges of being a deported alien found in the United States in violation of 8 U.S.C. § 1326. The jury returned a verdict of guilty. On March 22, 2005, the district court sentenced Avila-Rivera to ninety months in prison followed by three years of supervised release. Although 8 U.S.C. § 1326 provides a maximum sentence of two years, the district court found that Avila-Rivera qualified for statutory and Guidelines enhancements based on his status as an aggravated felon.

The Panel has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We review the denial of a constitutional right and questions of statutory construction and Guidelines interpretation *de novo*. *See United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999); *Bullion Servs., Inc. v. Valley State Bank*, 50 F.3d 705, 706 (9th Cir. 1995); *United States v. Kimbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005).

The district court did not violate Avila-Rivera's Fifth and Sixth Amendment rights when it refused to allow him to proceed with questions concerning Border Patrol Agent Trombley's investigation of Avila-Rivera's immigration status. Reversal is only necessary if sustained objections "amounted to, or contributed to the denial of a fair trial." *See United States v. Gurolla*, 333 F.3d 944, 958 (9th Cir. 2003) (internal quotations and citations omitted); *see also*

United States v. Holler, 411 F.3d 1061, 1066 (9th Cir. 2005) (holding that limits on testimony do not violate the Confrontation Clause unless they limit relevant testimony, prejudice the defendant, and “deny the jury sufficient information to appraise the biases and motivations of the witness.”).

Although the district court should have permitted Avila-Rivera to ask Agent Trombley if his search of government databases was limited to the claims system, this was harmless error. Our test for harmless error requires us “to assume that the damaging potential of the cross-examination [is] fully realized.” We then look at: 1) the importance of the witness’s testimony in the context of the entire case; 2) the extent of cross-examination otherwise permitted; and 3) the overall strength of the prosecution’s case. *See United States v. Miguel*, 111 F.3d 666, 671 (9th Cir. 1997).

There was considerable independent evidence to support the guilty verdict. Agent Medina testified that during his arrest Avila-Rivera admitted that he was a citizen of Mexico and “that he had not requested nor received permission to reenter the United States legally.” Medina further testified that he checked Avila-Rivera’s immigration status on five or six different government databases, and each database indicated that Avila-Rivera had re-entered illegally. This testimony coupled with the circumstances of Avila-Rivera’s arrest is more than

enough evidence for a jury to conclude, beyond a reasonable doubt, that Avila-Rivera illegally re-entered the United States. *See United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996).

Avila-Rivera next argues that the district court erred in increasing his Guidelines sentence sixteen levels under § 2L1.2(b)(A) because he had been convicted of a drug-trafficking offense with a sentence that exceeded thirteen months. In determining whether the § 2L1.2(b)(A) enhancement applies, we apply the categorical approach adopted by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990).

The *Taylor* approach requires the sentencing court “to look only to the fact of conviction and the statutory definition of the prior offense.” However, the court may also look “beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements [of the crime].” *Id.* at 602. When applying the second prong of the *Taylor* approach, the Supreme Court has held that the district court may consider informations, plea colloquies, and findings of fact. *See Shepard v. United States*, 125 S.Ct. 1254, 1259-60 (2005); *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001).

Although the Supreme Court has held that a district judge may consider informations at sentencing, our caselaw indicates that a charging document alone

is insufficient to prove that a prior crime constitutes a drug trafficking offense. *See United States v. Kovac*, 367 F.3d 1116, 1119 (9th Cir. 2004) (holding that “certificate and order, charging complaint, and judgment are insufficient proof” to qualify individual as a career offender under the Guidelines). The documentation of Avila-Rivera’s prior convictions upon which the district court relies does not conclusively establish that he was convicted of a “drug trafficking” offense within the meaning of the Guidelines. We affirm Avila-Rivera’s conviction but remand for a new sentencing hearing. If additional evidence proves that Avila-Rivera’s prior crimes constitute drug trafficking offenses, the district court may adopt the sixteen level Guidelines enhancement.

REMANDED.